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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 523

JOHN L. LEWIS, JOSEPHINE ROCHE AND HENRY G. SCHMIDT, TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Petitioners*,

v.

JOHN KOSTY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS IN REPLY

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ARGUMENT

The answers to respondent's contentions may be found in petitioners' brief, however, there are several misstatements and omissions in his opposition, which, if left unanswered, would fail to place the issues in their proper prospective.

1. Respondent objects to petitioners' use of a report of a Senate Subcommittee, the "Douglas Report,"[1] to demonstrate the economic necessity of the Trustees' action. Respondent had offered it in evidence at trial and it was rejected because of petitioners' objection (Brief for Respondent in Opposition, pg. 6). In point of fact, Respondent's Counsel in its direct examination of the Director-Trustee, Miss Josephine Roche, offered in evidence a sentence contained in that report to the effect that pensioners could file their applications with either Local Unions of the United Mine Workers of America or the Trust Fund (See Trial Transcript, Vol. III, pgs. 277-285). The Trial Court correctly pointed out that counsel could not use the document as a declaration against interest, as respondent desired, since it could not be determined who had made the statement which was incorporated in that Report. Furthermore, this proffer dealt with an aspect of the case below that respondent abandoned prior to appeal, to wit, the claim that Respondent had filed his application for a pension with a local union of United Mine Workers of America prior to the time of the change by the Trustees in requirements of eligibility for pensions.

In considering the *Douglas Report*, respondent argues that the reasons for the Trustees change of requirements of eligibility for pensions made without prior general notice of intent to make such changes, are irrelevant. Respondent fails to realize, that the criteria for judicial interference with the actions of the Trustees of this discretionary trust must be predicated

[1] Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress).

upon an *arbitrary* act by the Trustees (see opinion in the Court below, Appendix to Petition, pg. 8a). Petitioners contend, as was pointed out in the Douglas Report, that sound business judgment by the fiduciary Trustees compelled the change in requirements of eligibility in the manner in which it was done and, that this action was not arbitrary. Such report is clearly relevant and material in this regard.

2. In footnote 4, pgs. 6-7 of Respondent's Opposition, in setting forth his argument of equitableness, rather than arbitrariness, respondent errs in failing to state that pursuant to the Trust Indenture payments made to the Trustees, which constitute the trust res, are paid by those coal operators who, together with the United Mine Workers of America, a labor union, were settlors of the Trust.

3. At pages 11 and 12 of his Opposition, respondent refers to statements of counsel for petitioners at trial, with reference to the defenses of the statute of limitations and laches. These statements were made in connection with the claim of respondent, long since abandoned, that he had filed an application for a pension in December, 1952, prior to the change in requirements of eligibility for pensions. This contention, which the Trial Court rejected, was susceptible to being proven a complete falsehood by the testimony of several witnesses, who had died prior to the litigation. Had respondent pressed this claim within a reasonable time after the denial of his pension in 1952, the Trustees could have refuted his claim by calling these persons, now deceased, as witnesses.

4. Respondent's suggestion that there is no evidence to refute his employment from 1906 to 1923 is not wholly accurate (Respondent's Opposition, pgs. 9-10).

As pointed out in the Petition (p. 19) such evidence was not considered relevant to petitioners' defenses in the Trial Court. Nor did that Court in its view of the case, consider this subject in any fashion.

5. Finally, respondent labors under the impression that petitioners exhausted their judicial remedies when they filed their petition for rehearing before the Court of Appeals (see Opposition, page 5). The Court of Appeals, having decided issues not previously determined by the Trial Court, and with respect to certain defenses, not even having been briefed or argued, the matters contained in the petition for rehearing were, of necessity, raised for the first time. Proper procedures were followed in first presenting these matters in the petition for rehearing, prior to filing the petition for writ of certiorari in this Court.

CONCLUSION

For the reasons advanced in petitioners' petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, it is respectfully submitted that the same should be granted.

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